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16 UNITED STATES DISTRICT COURT
17 CENTRAL DISTRICT OF CALIFORNIA
18 SOUTHERN DIVISION

19 IN RE ALLERGAN, INC. PROXY
20 VIOLATION DERIVATIVES
21 LITIGATION

Case No. 2:17-cv-04776 DOC (KESx)

The Hon. David O. Carter
Courtroom 9D

CLASS ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION
REGARDING THE ALLOCATION
OF DAMAGES**

Date: November 27, 2017
Time: 8:30 a.m.
Location: Courtroom 9D

1 **I. INTRODUCTION**

2 This motion addresses the Court's order directing the parties in *In re*
3 *Allergan, Inc. Proxy Violation Securities Litigation*, Case No. CV 14-2004 DOC
4 (KESx) ("*Basile*") and *In re Allergan, Inc. Proxy Violation Derivatives Litigation*,
5 Case No. CV 17-4776 DOC (KESx) ("*Timber Hill*") to brief the manner in which
6 damages awarded in *Basile* and *Timber Hill* should be allocated in light of the
7 potential application of the limitation on damages awards provided by Section 20A
8 of the Securities Exchange Act of 1934, 15 U. S C. section 78t-1 (Dkt. 39).

9 Lead Plaintiff Timber Hill, LLC brought this action, individually and on
10 behalf of others who traded in derivative securities of Allergan Inc. ("Allergan")
11 common stock (collectively, the "Derivatives Plaintiffs") against defendants
12 William Ackman, Michael Pearson, Valeant Pharmaceuticals International, Inc.
13 Pershing Square Capital Management L.P. and their various corporate affiliates.
14 Derivatives Plaintiffs seek to recover their losses resulting from defendants'
15 violation of the securities laws in connection with the unlawful purchase by
16 Pershing Square Capital Management L.P. and its affiliates ("Pershing Square") of
17 derivative securities of Allergan common stock while in possession of material
18 non-public information regarding: (1) Valeant Pharmaceutical International Inc.'s
19 ("Valeant") plan and scheme to acquire Allergan by means of a hostile takeover in
20 2014; and (2) Valeant's intention to pay a substantial premium for Allergan over
21 and above its initial bid.

22 In both actions, defendants are alleged to have unlawfully purchased
23 Allergan securities while in possession of material non-public information
24 concerning Valeant's impending plans to make a takeover bid. In *Basile*, sellers of
25 Allergan common stock have brought claims similar to those advanced by
26 Derivatives Plaintiffs in *Timber Hill*. Defendants are thus alleged to have
27 unlawfully purchased two separate categories of securities—derivative securities
28 and common stock—as part of their scheme to illegally profit from inside

1 information about Valeant's secret plan to mount a hostile takeover of Allergan.
2 These two separate class actions assert claims on behalf of persons who engaged in
3 transactions in these different categories of securities.

4 The class definitions in the *Timber Hill* and *Basile* actions are mutually
5 exclusive in that the *Timber Hill* action seeks to recover damages on solely on
6 behalf of persons who traded in Allergan-related derivative securities during the
7 period defendants were unlawfully purchasing Allergan related derivatives and the
8 *Basile* action seeks to recover damages solely on behalf of the sellers of Allergan
9 common stock during the period defendants were unlawfully purchasing Allergan
10 common stock. The two class actions each seek, among other things, damages and
11 disgorgement of defendants' profits realized from their unlawful transactions in
12 securities pursuant to Section 20A—recovery of which is statutorily limited for each
13 of the two categories of transactions to the profits realized by the defendants (i.e.,
14 the proceeds of the unlawful transactions, plus the amount earned by defendants on
15 those proceeds until the date of judgment).

16 The calculation of the statutory cap for each of the two categories of
17 transactions is a matter that may properly be determined by the Court in advance of
18 the first scheduled trial with the participation of the parties in both the *Timber Hill*
19 and *Basile* actions. This is particularly true where, as here, the questions to be
20 decided are ones of statutory construction, where the amount of proceeds realized
21 by defendants on their unlawful transactions is not materially in dispute, and where
22 the calculation of the return earned by defendants on the proceeds from their
23 unlawful transactions is easily calculated by the Court.

24 Derivatives Plaintiffs therefore suggest the following process for allocation
25 and distribution of potential damages: (1) First, prior to the *Basile* trial, the Court
26 determines the amount of the damages caps under Section 20A for the two
27 categories of securities transactions. The Court will thereby determine the separate
28 caps applicable to both cases. This approach will address defendants' concern they

1 may be made to pay twice because the aggregate of the two caps will equal, but not
 2 exceed, the total profits realized by defendants resulting from their transactions in
 3 both categories of unlawful securities transactions. In order to make such a
 4 determination, the parties in both the *Timber Hill* and *Basile* cases will brief the
 5 issue of how the Section 20A damages cap should be calculated. Following the
 6 briefing, the Court can hold a pre-trial hearing if deemed necessary by the Court.
 7 (2) Second, the juries in the *Basile* and *Timber Hill* trials will determine the amount
 8 of actual damages sustained by the separate classes in their respective trials. (3)
 9 Third, at the conclusion of the *Timber Hill* trial, the Court will enter separate final
 10 judgments—applying the applicable separate caps as may be required by the
 11 respective jury awards.

12 This approach ensures all parties have a right to be heard regarding the
 13 calculation of the damages cap while protecting defendants from the potential for
 14 inconsistent rulings as to the amount of the damages cap.

15 **II. LEGAL STANDARD**

16 Questions of statutory interpretation lie within the “distinct and exclusive
 17 province of the trial judge.” *Polanco v. E. Chigago Mach. Tool Corp.*, No.
 18 CV1108927MMM (MRWx), 2012 WL 12886210, at *4 (C.D. Cal. Sept. 18, 2012)
 19 (denying defendant’s motion to dismiss). *See also Darby v. Century Bus. Servs.,*
 20 *Inc.*, 96 F. App’x 277, 280 (6th Cir. 2004) (characterizing interpretation of PSLRA
 21 as a question of statutory interpretation).

22 **III. ARGUMENT**

23 **A. The Calculation Of The PSLRA Damages Cap Is A Legal Issue To** 24 **Be Decided By The Court**

25 The determination of the Section 20A damages cap in these cases is a matter
 26 of statutory construction. Here, there are two class actions: *Basile*, involving
 27 sellers of Allergan common stock, and *Timber Hill*, involving traders in Allergan-
 28 related derivative securities, asserting claims arising out of the same alleged course

1 of conduct. The Court needs to determine the amount of defendants' profits for
2 each category of transactions. Under Section 20A, damages "shall not exceed the
3 profit gained or loss avoided [by the defendant]". 15 U.S.C. § 78t-1(b)(1).

4 We anticipate issues of statutory construction here may include resolution of
5 defendants' argument to artificially reduce the extent of their liability by suggesting
6 that Section 20A imposes a limitation based on profits realized after the public
7 disclosure of the information at issue based on their contention that their profits
8 should be calculated as of the date the truth was publicly disclosed. In applying the
9 language of Section 20A, the Court may also be called upon to address the *Basile*
10 plaintiffs' contention that the purchase of Allergan common stock by non-party
11 issuers of call options and equity forward contracts required to fulfill the
12 requirements of derivative contracts entered into during the Class Period should be
13 deemed to be the purchase of common stock, which is included in the claims
14 asserted in the *Basile* case. But this argument, if made, would be contrary to the
15 class definition in the *Basile* case, which limits recovery to "all persons who ***sold***
16 ***Allergan publicly traded common stock*** from February 25, 2014 through April 21,
17 2014." Case No. CV 14-2004 DOC (KESx), Second Amended Complaint, Dkt.
18 138 (emphasis added). The *Basile* plaintiffs explicitly limited their class and claims
19 to persons who seek damages incurred as a result of selling Allergan stock during
20 the foregoing Class Period, and did not include claims based on transactions in
21 derivative securities purchased by Pershing Square or the corresponding profits
22 made on those transactions.

23 **B. Actual Damages Shall Be Calculated By the *Basile* and *Timber***
24 **Hill Juries**

25 Once these threshold questions are decided by the Court, the *Basile* and
26 *Timber Hill* juries can determine actual damages to be awarded to the respective
27 classes in each case. Based on the class definition in *Basile*, plaintiffs in the *Basile*
28 case will be limited to seeking damages that flow from sale of Allergan common

1 stock during the Class Period. Similarly, in the *Timber Hill* trial, the plaintiffs will
2 be limited to damages that flow from transactions in derivative securities. Thus, the
3 Section 20A damages caps for the *Basile* plaintiffs and *Timber Hill* plaintiffs should
4 be mutually exclusive and can be calculated separately. By calculating the caps
5 before the *Basile* trial, the Court can address defendants' concern about the
6 possibility of conflicting verdicts as to the amount of the aggregate damages cap.
7 The Court can also avoid the risk that either the *Basile* or *Timber Hill* plaintiffs
8 would be deprived of their opportunity to be heard on the issue of the damages cap.

9 **C. Alternatively, Damages Could Be Allocated On A Pro Rata Basis**

10 Alternatively, if the Court determines the Section 20A damages cap in the
11 aggregate without determining defendants' profits separately realized on derivatives
12 transactions and defendants purchases of common stock, damages could still be
13 awarded in each case—albeit on a potentially less precise and equitable basis—by
14 totaling and then reducing the total confirmed damages in both cases awarded in
15 each case by the aggregate cap, assuming the total damages exceed the total cap,
16 and then, if the total cap is exceeded, the Court would make a pro rata reduction of
17 the each damages award according to the cap-reduced damages awarded in each
18 case.¹

19 For example, assuming for illustrative purposes that the damages cap is set at
20 \$2.5 billion based on all of defendants' illegal transactions in both categories of
21 securities and the *Basile* jury awards damages in the amount of \$3 billion and the
22 *Timber Hill* jury awards damages in the amount of \$3 billion, the jury awards
23 would be reduced on a *pro rata* basis to \$2.5 billion in total the *Basile* plaintiffs and
24 the Derivatives Plaintiffs would each receive 50% of the reduced total amount of
25 \$2.5 billion. After allocating damages among both classes, then the Court would

26
27 ¹ Given the amount of money at issue, it would be appropriate for the Court
28 to order defendants to provide some method for securing the payment of any
ultimate award of damages in both cases.

1 then enter separate final judgments in both cases in those amounts. *Willis v. Westin*
2 *Hotel Co.*, 884 F.2d 1556, 1558 (2d Cir. 1989) (issuing final judgment after jury
3 allocated damages for joint defendants).

4 **IV. CONCLUSION**

5 For the foregoing reasons, Derivatives Plaintiffs respectfully request the
6 Court to order the parties to submit further briefing in accordance with the
7 foregoing proposal regarding the method for calculation of the Section 20A
8 damages caps prior to the *Basile* and *Timber Hill* trials.

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10 Dated: October 30, 2017

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